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IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

AT&T CORP., *et al.*,
Petitioners,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE LOCAL EXCHANGE CARRIERS IN OPPOSITION

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QUESTION PRESENTED

Whether the Eighth Circuit—having held in a prior decision that the Telecommunications Act of 1996 gives State commissions, not the FCC, exclusive authority to determine the "just and reasonable rates" for local interconnection arrangements under sections 251(c) and 252(d)—acted within the scope of its jurisdiction and discretion when it enforced its own mandate against the FCC, which, in defiance of the court's prior ruling, had reasserted authority to disregard the State commissions' local rate determinations and to impose its own pricing principles in evaluating an incumbent carrier's compliance with the requirements of sections 251(c) and 252(d).

LIST OF PARTIES AND AFFILIATES

The petitioners seek review of an order of the United States Court of Appeals for the Eighth Circuit. The order arises from the same underlying proceedings as the order challenged in *AT&T Corp., et al. v. Iowa Utilities Board, et al.*, cert. granted, No. 97-826 and related cases (U.S. Jan. 26, 1998). The parties to these proceedings are listed in the appendix to the petition for a writ of certiorari in No. 97-826 at 1a-4a, 73a-78a, 92a.

Pursuant to Supreme Court Rule 29.6, the parties to this brief submit the following statement concerning parent companies and non-wholly owned subsidiaries:

Ameritech Corporation has no parent companies and no non-wholly owned subsidiaries.

Bell Atlantic Corporation has no parent companies. It owns the following subsidiaries having securities in the hands of the public: Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., Bell Atlantic Financial Services, Inc., NYNEX Corporation, New York Telephone Company, New England Telephone and Telegraph Company, Bell Atlantic Credit Corporation, and Bell Atlantic Global Funding Corporation. In addition Bell Atlantic has the following non-wholly owned subsidiaries: One Parkway, Inc., ICA Foreign Financial, Inc., Chesapeake Directory Sales Company, Atlantic West B.V., Grupo Iusacell, S.A. de C.V., Bell Atlantic New Zealand Holdings, Inc., PrimeCo Personal Communications, L.P., Washington, D.C. SMSA Limited Partnership, New York SMSA Limited Partnership, Upstate Cellular Network, Orange County Poughkeepsie MSA Limited Partnership, Pittsfield Cellular Telephone Company, Allentown SMSA Limited Partnership, Reading SMSA Limited Partnership, Pittsburgh SMSA Limited Partnership, Pennsylvania RSA No. 6(II) Limited Partnership, Columbia Cellular Telephone Company,

Anderson Cellular Telephone Company, Las Cruces Cellular Telephone Company, TELE-TV, TELE-TV Media, L.P., TELE-TV Systems, L.P., NYNEX Master Lease Partners, Global Directory Services Company, MEDIATEL spol. s.r.o., Bell Atlantic Information Services Hellas S.A., Polskie Ksiazki Telefoniczne Sp. z o. o., Nord Trans Biuro Reklam Sp. z o. o., NYNEX Worldwide Directories Company, Kipling Associates L.L.C., NYNEX International (Asia) Ltd., and Gibraltar NYNEX Communications Limited.

BellSouth Corporation has no parent companies. BellSouth Corporation's non-wholly owned subsidiaries are 1155 Peachtree Associates, BellSouth New Zealand, Compania de Radiocomunicaciones Moviles S.A., Telcel Celular C.A., Tele 2000, S.A., BellSouth Wireless Data, L.P., RAM Mobile Data Belgium, S.C.S., RAM Mobile Data C.V., BellSouth Carolinas PCS, L.P. (d/b/a BellSouth Mobility DCS in NC & SC), Bloomington Cellular Telephone Company, Chattanooga MSA Limited Partnership, Decatur RSA Limited Partnership, Florida RSA #2B (Indian River) Limited Partnership, Georgia RSA No. 1 Limited Partnership, Georgia RSA No. 2 Limited Partnership, Georgia RSA No. 3 Limited Partnership, Gulf Coast Cellular Telephone Company, Jacksonville MSA Limited Partnership, Lafayette MSA Limited Partnership, Los Angeles Cellular Telephone Company, Louisiana RSA No. 7 Cellular General Partnership, MCTA, Memphis SMSA Limited Partnership, Muncie Cellular Telephone Company, Inc., Orlando SMSA Limited Partnership, Richmond Cellular Telephone Company, Tennessee RSA Limited Partnership, and Terre-Haute Cellular Telephone Company, Inc.

The GTE Entities consist of the following companies, each of which is a subsidiary of GTE Corporation: GTE Service Corporation, GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Midwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated,

GTE North Incorporated, GTE Northwest Incorporated, GTE Hawaiian Telephone Company Incorporated, GTE West Coast Incorporated, Contel of Minnesota, Inc., and Contel of the South, Inc. In addition, GTE Corporation has the following subsidiaries or affiliates that have outstanding securities in the hands of the public: BC TELECOM, Inc., BBN Corporation, Cable-Axion Digitel Inc., Cable-Axion Quebec Inc., Caribbean Reservation Center, C. por A., Communications Telefonicas, C. por A., Conagro Telecommunications, S.A., CTI Compania de Telefonos del Interior S.A., CTI North Compania de Telefonos del Interior S.A., Digital Courier International Inc., GTE California Incorporated, GTE Directories Corporation Ltd., GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, GTE Leasing Corporation, GTE Midwest Incorporated, GTE Mobilnet of Florence, Alabama Incorporated, GTE Mobilnet of Jacksonville Incorporated, GTE Mobilnet of Jacksonville II Incorporated, GTE Mobilnet of Wilmington Incorporated, GTE Mobilnet of Wilmington II Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, GTE Telecom Saudi Arabia Ltd., GTE Yellow Pages Publishing Hungary Kft, La Compagnie de Telephone Anglo-Canadienne/ Anglo-Canadian Telephone Company, MTX Italia, Page Saudi Arabia Services, Ltd., Parque Industrial ITABO, S.A., Quebec-Telephone, Radiowealth, Inc., The Micronesian Telecommunications Corporation, and Zona France Las Americas.

SBC Communications Inc., which has shares outstanding in the hands of the public, is the parent company of Southwestern Bell Telephone Company and Southwestern Bell Yellow Pages, Inc. SBC Communications Inc. has the following non-wholly owned subsidiaries which have shares or partnership interests outstanding in the hands of the public: Abilene SMSA Limited Partnership, Amarillo SMSA Limited Partnership, Buffalo Telephone Company, Cellular Mobile Corporation, Champaign CellTelco,

Dallas SMSA Limited Partnership, Decatur Cellular Telephone Company, Inc., Eastern Missouri Cellular Limited Partnership, Gainesville Development Associates Limited, Gary Cellular Telephone Company, Kansas City SMSA Limited Partnership, Lubbock SMSA Limited Partnership, McAllen/Edinburgh SMSA Limited Partnership, Midland-Odessa SMSA Limited Partnership, Missouri RSA 8 Limited Partnership, Missouri RSA 9 B1 Limited Partnership, Oklahoma City SMSA Limited Partnership, Oklahoma RSA 3 Limited Partnership, Oklahoma RSA 9 Limited Partnership, PTF/FCLC Associates (LP), PTF/GECC (California) Associates (LP), San Antonio SMSA Limited Partnership, SBMS Cellular Telecommunications Bloomington, Inc., SBMS Cellular Telecommunications Springfield, Inc., S.T.L.M. Programming Services Limited, St. Joseph SMSA Limited Partnership, Texas RSA 9B4 Limited Partnership, Texas RSA 10B1 Limited Partnership, Texas/Illinois Cellular Limited Partnership, Topeka SMSA Limited Partnership, Washington/Baltimore Cellular Limited Partnership, Wichita SMSA Limited Partnership, and Worcester Telephone Company.

On April 1, 1997, SBC Communications Inc., Pacific Telesis Group ("PAC"), and SBC Communications (NV) Inc., a wholly owned subsidiary of SBC Communications Inc., completed an agreement and plan of merger by the means of which PAC and SBC Communications (NV) Inc. were merged into PAC, and PAC became a wholly owned subsidiary of SBC Communications Inc. PAC, formerly a publicly held corporation, and its wholly owned subsidiaries, Pacific Bell and Nevada Bell, provide telecommunications services subject to the general jurisdiction of the Federal Communications Commission.

U S WEST, Inc. has no parent company. Financial Security Holdings, Ltd. is a non-wholly owned subsidiary of U S WEST, Inc.

The United States Telephone Association is a non-profit trade association representing the interest of facilities-based local exchange and exchange access providers.

These companies are its full members. USTA also has international members who provide local exchange services in other jurisdictions, and associate members including consultants, manufacturers, banks and investors, and other parties with interests in the local exchange carrier industry. USTA has no parent companies, subsidiaries, or affiliates for whom disclosure is required by Rule 29.6.

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BRIEF OF THE LOCAL EXCHANGE CARRIERS IN OPPOSITION

Ameritech Corporation, Bell Atlantic Corporation, BellSouth Corporation, the GTE Entities, SBC Communications Inc., U S WEST, Inc., and the United States Telephone Association, petitioners below, respectfully oppose the petitions for a writ of certiorari.

Petitioners seek review of an Eighth Circuit order compelling compliance with that court's own prior mandate. In July 1997, the Court of Appeals ruled that the Tele-

communications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"), "plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act." *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 796 (8th Cir. 1997). Scarcely a month later, in August 1997, the FCC openly defied the Eighth Circuit's ruling. Ostensibly invoking its authority to evaluate a Bell operating company's application to provide long-distance services, the agency announced its intention to ignore the State commissions' rate determinations and to decide for itself what pricing principles should be applied under the Act's local competition provisions. Because the agency's conduct conflicted with the court's prior holding and constituted a direct challenge to its authority, the Court of Appeals issued a writ of mandamus ordering the FCC to obey the prior mandate and to abandon its threat to override the States' substantive pricing determinations under the Act. Pet. App. 1a-2a.[1]

The Eighth Circuit's underlying jurisdictional holding is now before this Court in *AT&T Corp. v. Iowa Utilities Board*, No. 97-826, and related cases ("*Local Competition Case*"). The present petitions should be held pending the Court's decision in that case. If this Court were to affirm the Eighth Circuit's jurisdictional ruling, that court's order enforcing its own judgment would be plainly correct, the current petitions would present no independently certworthy question, and the petitions accordingly should be denied. If, on the other hand, the government were to prevail in its challenge to the jurisdictional ruling, the Eighth Circuit's underlying judgment would be vacated in part, the mandamus order enforcing that judgment would become moot, and these petitions could accordingly be disposed of summarily. Furthermore, granting these petitions would contribute nothing to the Court's consideration of the *Local Competition Case*: Petitioners have al-

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[1] "Pet. App." refers to the appendix to the petition in No. 97-1519.

ready addressed in their merits briefs the issues surrounding the mandamus order. Granting the petitions at this stage would merely add yet another layer of needless complexity—and several more rounds of multi-party briefing—to an already complicated proceeding involving seven discrete questions.

STATEMENT OF THE CASE

1. The 1996 Act. In the 1996 Act, Congress opened to further competition the markets for both local and long-distance telephone service. With respect to local telephone service, Congress chose to rely in the first instance on private carrier-to-carrier negotiations to establish the rates and other terms and conditions for local interconnection arrangements. Where the parties themselves cannot agree on all issues within a prescribed bargaining period, Congress provided that either party may petition the appropriate State commission to arbitrate their differences. 47 U.S.C. § 252(b)(1). Most significantly for present purposes, the Act entrusts solely to State commissions the resolution of disputes concerning the crucial question of pricing. It provides that "a State commission shall . . . establish any rates for interconnection, services, or network elements," in accordance with pricing standards spelled out in the statute. *Id.* § 252(c)(2).

In contrast to its broad reliance on private negotiations backed up by State-supervised arbitrations, Congress assigned the FCC a specifically circumscribed role in implementing the Act's local competition provisions. With a few tightly drawn exceptions,[2] Congress refused to give

[2] For example, if a State commission declines to carry out its responsibilities under section 252, the FCC "shall assume the responsibility of the State commission . . . with respect to the proceeding or matter." 47 U.S.C. § 252(e)(5). In addition, Congress gave the FCC "exclusive jurisdiction" over the administration of "telecommunications numbering," including the responsibility to make numbers available "on an equitable basis." *Id.* § 251(e)(1). It also gave the FCC a role in defining a LEC's duty to provide "number portability," § 251(b)(2); in determining cost recovery

the FCC a charter to intrude on the States' traditional jurisdiction to regulate local exchange facilities and services. In particular, Congress assigned the FCC *no* responsibilities for the pricing of interconnection arrangements.

With respect to long-distance services, Congress established a mechanism for allowing the Bell operating companies (or "BOCs") to compete for the first time with the incumbent long-distance oligopolists (AT&T, MCI, and Sprint). *See* 47 U.S.C. § 271. To satisfy the conditions for long-distance entry, a Bell company must demonstrate that it has complied with a 14-point "competitive checklist" set forth in section 271(c)(2)(B). *See id.* § 271(d)(3)(A). The checklist in turn requires the Bell company to provide, among other things, "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)." *Id.* § 271(c)(2)(B)(i).[3]

2. The Eighth Circuit's Local Competition Decision. In August 1996, the FCC issued a massive 700-page order, prescribing detailed national rules governing every conceivable aspect of local interconnection, including comprehensive and highly technical rules dictating to State commissions the precise formulas they must use in resolving pricing disputes under the Act. Two months later, the Eighth Circuit stayed the FCC's pricing rules because of "what appear[ed] to be a rather clear and direct indica-

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for numbering administration arrangements and number portability, § 251(e)(2); in determining what network elements should be unbundled, § 251(d)(2); in prescribing permissible resale restrictions, § 251(c)(4)(B); and in providing for the treatment of comparable carriers as "incumbents," § 251(h)(2).

[3] The checklist similarly requires "access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)," 47 U.S.C. § 271(c)(2)(B)(ii), "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)," *id.* § 271(c)(2)(B)(xiii), and "services . . . available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)," *id.* § 271(c)(2)(B)(xiv).

tion [in the statutory text] that the state commissions"—not the FCC—"should establish prices." *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 424 (8th Cir.). This Court subsequently denied repeated applications to vacate the stay. 117 S. Ct. 378, 379 (1996) (Thomas, J., Circuit Justice); 117 S. Ct. 429 (1996).

In July 1997, after further briefing and oral argument, the Court of Appeals held, in the plainest possible terms, that "none of the statutory provisions relied on by the FCC supply it with jurisdiction over the pricing of local telephone service"; on the contrary, the language of the 1996 Act "directly and straightforwardly assigns *to the states* the authority to set the prices regarding the local competition provisions of the Act in subsections 252(c)(2) and 252(d)." *Iowa Utils. Bd.*, 120 F.3d at 795, 797 (emphasis added). The court accordingly vacated as unlawful the FCC's rules purporting to intrude on the pricing jurisdiction that Congress had reserved to the States.

3. The FCC's Response. The FCC made no effort to hide its disdain for the Eighth Circuit's jurisdictional rulings. Immediately after the court entered its stay order, the FCC's then-chairman branded the ruling "a grievous error" and "an astounding piece of judicial activism,"[4] exhibiting "[t]he kind of awesome supremacy that the Chinese emperors would exercise over every rice-picking effort in the country."[5] After the court issued its merits decision, the chairman reiterated his displeasure with the Eighth Circuit's "judicial intervention," accusing the court of "substitut[ing] its judgment for ours" and urging Con-

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[4] Reed Hundt, *Speech Before International Radio & Television Society*, 1996 FCC LEXIS 5840, at *15-*16 (Oct. 18, 1996).

[5] *Hundt Calls Court Stay of FCC Rules Example of Extreme Judicial Activism*, Daily Report for Executives, at C-1 (Oct. 17, 1996).

gress to amend the Act "until courts finally submit to its direction." [6]

On August 19, the FCC put this rhetorical defiance into practice. In an order rejecting on other grounds Ameritech's application for authority to provide long-distance service in the State of Michigan, the FCC went out of its way to announce its intention to disregard the Eighth Circuit's holding that the States alone have jurisdiction to determine the pricing of interconnection arrangements. *Application of Ameritech Michigan*, 12 FCC Rcd 20543 (1997) ("Ameritech Order") (excerpts reproduced at Pet. App. 21a-34a). In a portion of its order expressly unrelated to its disposition of Ameritech's application (*see id.* at 21a), the Commission claimed that its authority under section 271 to evaluate a Bell company's compliance with the "competitive checklist" empowers it to displace the States and to determine for itself the pricing principles that a Bell company must follow under sections 251(c) and 252(d). As if to underscore its point, the FCC proceeded to reimpose for purposes of section 271 precisely the same pricing principles that the Eighth Circuit had vacated a month earlier. *See id.* at 28a-34a.

The FCC attempted to sidestep the Eighth Circuit's decision by stating that, because the court's holding rested on jurisdictional grounds, "[t]he court . . . expressly did not address the substantive merits of the Commission's [vacated pricing] rules," and it therefore "made no ruling concerning the proper meaning of the statutory requirement in section 252(d) that rates must be cost-based." *Id.* at 23a-24a. The agency accordingly asserted that it was at liberty, despite the Eighth Circuit's decision, to re-impose uniform national pricing standards under section 271 that would trump State pricing jurisdiction under sections 251 and 252.

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[6] Reed Hundt, *The Light at the End of the Tunnel vs. the Fog: Deregulation vs. the Legal Culture*, 1997 FCC LEXIS 4330, at *9, *10, *12 (Aug. 14, 1997).

4. The Eighth Circuit's Order Enforcing its Mandate. Soon after the Ameritech Order was released, respondents and a group of 32 State commissions filed separate petitions to enforce the Eighth Circuit's mandate in *Iowa Utilities Board*. After briefing and oral argument, the Eighth Circuit issued a writ of mandamus directing the FCC to comply with the court's prior mandate.

The Court of Appeals stated that the FCC's "attempt to reassert the vacated pricing rules by imposing them as conditions for [long-distance] entry by the Bell Operating Companies . . . does by indirection what we told the FCC in *Iowa Utils. Bd.* it could not do." Pet. App. 8a. Examining the FCC's rationale for its conduct, the court observed that the relevant portions of section 271 "do nothing more than incorporate by reference the specific requirements of sections 251 and 252," and "our July 18 decision clearly held that only the state commissions have the statutory authority to set prices under sections 251(c) and 252(d)." *Id.* at 10a. In light of that earlier decision, the court stated, the FCC's role under section 271 is "quite simple: It must ascertain whether each individual applicant BOC has complied with the individual state commission's pricing scheme applicable to it and in effect at the time of the application." *Id.* at 12a. By imposing on Bell companies, as a condition for obtaining relief under section 271, the requirement that they establish local pricing pursuant to the FCC's pricing methodology rather than the State commission's methodology, the FCC was simply attempting to exercise section 252 pricing authority through section 271. But "the very core of our holding," the court stated, "was that the state commissions—not the FCC—have the exclusive authority to determine the pricing requirements of section 252(d)." *Id.* at 10a. "The FCC may not accomplish indirectly that which we have held it may not do directly." *Id.* at 15a.[7]

[7] The Court of Appeals explained: "The FCC is free to ask (and indeed has asked) the Supreme Court to reverse our decision [on jurisdiction], and it is free to ask Congress to give it the authority

The Eighth Circuit was further troubled by the fact that the FCC's renewed claim of pricing authority was "calculated to have a chilling effect on the state commissions' employment of . . . pricing schemes [different from those preferred by the FCC], and to do so in a way that avoids our review." Pet. App. 18a. "Having lost in its bid to usurp the power to determine intrastate prices in the Eighth Circuit," and aware that the statute assigns direct review of section 271 orders to the D.C. Circuit, "the FCC now seeks to have another bite at the apple in the District of Columbia Circuit." *Id.* "This is the type of 'evasion' that necessitates mandamus relief." *Id.* The court explained that "[f]ailure to clarify the mandate and direct future compliance where mandamus is the only adequate remedy would 'reward bureaucratic misconduct and encourage judicial anarchy.'" *Id.* at 16a (quoting *Department of the Navy v. FLRA*, 835 F.2d 921, 923 (1st Cir. 1987)).

In line with precedent,[8] the Eighth Circuit took care to craft purely forward-looking relief. Leaving the Ameritech Order itself entirely "untouched," the court sought only to "assure state commissions that the pricing authority granted to them under section 252 is not eviscerated" and to "disabuse the FCC of the mistaken notion that it has the power to enforce the pricing policy judgment articulated" in the advisory portion of the Ameritech Order. *Id.* at 19a. The court accordingly directed the FCC to comply with the mandate in *Iowa Utilities Board* in the future

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to regulate the intrastate pricing of the local competition provisions we have said it does not now have. But in the absence of reversal or Congressional amendment, the FCC may not reassert its interpretation of section 252(d) or reassert its purported authority to mandate [its preferred] pricing schemes for the local competition provisions when our order so clearly denies it that authority." Pet. App. 13a-14a (footnotes omitted).

[8] *American Trucking Ass'ns, Inc. v. ICC*, 669 F.2d 957, *later opinion*, 673 F.2d 82 (5th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983).

and to "cease and desist from attempting to give effect to its interpretation of the substantive [pricing] requirements of section 252(d)." *Id.* at 19a-20a.

ARGUMENT

I. THE PETITIONS SHOULD BE HELD PENDING THIS COURT'S DECISION IN THE *LOCAL COMPETITION CASE*

Because the Eighth Circuit issued its mandamus order solely to enforce its jurisdictional mandate in *Iowa Utilities Board*, this Court's decision on the underlying jurisdictional question will control the disposition of the present petitions. As discussed in the following section, if the Court affirms the Eighth Circuit's judgment, as we believe it should, nothing in these petitions—which attack only the Court of Appeals' established authority to protect its own judgment—will warrant independent review. On the other hand, if this Court were to reverse the Eighth Circuit's jurisdictional ruling, its decision would effectively moot the mandamus dispute. In that event, under this Court's usual practice, the current petitions would be granted, the judgment below would be vacated, and the case would be remanded for dismissal on the basis of mootness. *E.g., Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93-94 (1979); *United States v. Munsingwear Corp.*, 340 U.S. 36, 39-41 (1950). For these reasons, as the Solicitor General correctly suggests, these petitions should be held pending this Court's decision in the underlying case and should be disposed of in light of that decision.

The Court should reject the Solicitor General's alternative request to grant certiorari and consolidate these petitions for review with the pending case. The Court already has before it for consolidated briefing and argument seven discrete questions presented by eight separate petitions and cross-petitions encompassing two different Eighth Circuit judgments, each supported by a separate opinion and each

addressed to a separate and extraordinarily lengthy FCC order. Petitioners and their supporters have filed over 260 pages of opening briefs on these issues, and three additional rounds of briefing will soon follow. The current petitions concern a related Eighth Circuit decision implicating yet another lengthy FCC order. Granting review now would serve only to complicate further a multi-faceted, multi-party case of unusual magnitude and would subject both the Court and the parties to the potentially pointless dedication of still more resources to an issue that, under the government's own view of the case, may become moot. In addition, if certiorari were granted in this case, briefing would proceed on a different schedule from the principal proceeding—making it particularly difficult to coordinate briefs and avoid duplication.

The Court would gain nothing of substance from such an undertaking. Because petitioners have already fully addressed in their merits briefs the respects in which they believe that the Eighth Circuit's mandamus order bears on the issues currently before the Court, further separate briefing on the mandamus issue would be repetitive and would yield no benefits.

Nor is there any merit to petitioners' speculative assertion that immediate review is needed to forestall requests for "a variety of emergency remedies from the D.C. Circuit, perhaps from the Eighth Circuit, and ultimately from this Court"—requests that supposedly will be triggered by the FCC's "compliance with (and interpretation of) the mandamus order." FCC Pet. 29. In the first place, the FCC will confront no genuine issue of "interpretation": it must simply confine its "pricing role" under section 271, as the Court of Appeals directed, to "determining whether applicant BOCs have complied with the pricing methodology and rules adopted by the state commissions and in effect in the respective states in which such BOCs seek to provide in-region, [long-distance] services." Pet. App. 20a. And if an affected party nonetheless

chooses to apply for emergency relief from any FCC action—an event that is no more likely to occur if this Court holds the current petitions—the courts are amply equipped to respond based on the merits of any such request. Nothing about that hypothetical scenario remotely justifies a premature grant of review.

II. THE PETITIONS PRESENT NO INDEPENDENTLY CERTWORTHY ISSUE

Although holding these petitions is the sensible course given the pendency of a directly related case, the petitions present no question independently worthy of this Court's review. The Eighth Circuit's order is both wholly consistent with the statute and amply supported by settled precedent in this Court and in the courts of appeals.

A. The Court of Appeals Plainly Had Jurisdiction to Enforce Its Own Mandate

Petitioners assert that the Eighth Circuit had no jurisdiction to issue its mandamus order. FCC Pet. 24-27; AT&T Pet. 17 n.4.[9] In their view, because Congress designated "the D.C. Circuit as the exclusive forum for review of 'any order of the Commission granting or denying any application' under Section 271" (FCC Pet. 25), and because a court may issue mandamus only in aid of its own jurisdiction, the Eighth Circuit was powerless to address any defiance of its mandate that the FCC might express in a section 271 order. Petitioners overlook the fact that the Eighth Circuit's jurisdiction had already attached in the prior proceedings in the Eighth Circuit: "The need for an independent basis of jurisdiction is easily applied when jurisdiction has already attached," as in "cases that authorize issuance of a writ to enforce compliance with the mandate rendered on a prior appeal or writ proceeding." C. Wright, A. Miller & E. Cooper, 16

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[9] "AT&T Pet." refers to the petition in No. 97-1520.

Federal Practice and Procedure § 3932, at 473-74 (2d ed. 1996) (footnote omitted).[10]

As this Court has squarely held, that rule applies even where the decision in which the defiance occurs is appealable only to some other court. In *United States v. United States District Court for the Southern District of New York*, 334 U.S. 258 (1948), the Second Circuit had held that it was without mandamus jurisdiction to enforce its prior mandate because the district court's order at issue was by then reviewable only by direct appeal to the Supreme Court. On certiorari, this Court reversed. Rejecting an argument indistinguishable from that advanced here by petitioners, the Court ruled that an appellate court may issue mandamus even "where there is no existing or future appellate jurisdiction to which it can relate." *Id.* at 263. The "high function of mandamus," the Court stated, "may be as important in protecting a past exercise of jurisdiction as in safeguarding a present or future one." *Id.* at 264. The Court accordingly ruled that the court of appeals *did* have mandamus jurisdiction "even though we assume arguendo that all further appeals in the case would come here." *Id.*[11]

The Solicitor General argues that the Eighth Circuit should nonetheless have declined to exercise its mandamus

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[10] *See also Office of Consumers' Counsel v. FERC*, 826 F.2d 1136, 1140 (D.C. Cir. 1987) ("A federal appellate court has the authority, through the process of mandamus, to correct any misconception of its mandate by a lower court or administrative agency subject to its authority. . . . A party always has recourse to the court to seek enforcement of its mandate."); *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1032 (D.C. Cir. 1983) (invoking "our inherent power to construe the mandate of our earlier decision").

[11] The Solicitor General's reliance (Pet. 26-27) on *In re Ojeda Rios*, 863 F.2d 202 (2d Cir. 1988), is entirely misplaced. The Second Circuit in that case refused to issue mandamus directed to a district judge in Puerto Rico because the Puerto Rico court was not, and had never been, "a district court over which appellate jurisdiction existed." *Id.* at 204. The same reasoning obviously does not apply in this case.

authority because a direct appeal to the D.C. Circuit provided an alternative remedy. FCC Pet. 26 & n.10. But, even if the advisory pricing discussion in the Ameritech Order could properly have been appealed, that would not foreclose the mandamus relief granted here: an alternative remedy can bar mandamus only if it is *adequate*, and an opportunity to relitigate a previous decision is *never* adequate. The Solicitor General's argument to the contrary is again foreclosed by this Court's precedent. In *General Atomic Co. v. Felter*, 436 U.S. 493 (1978) (per curiam), this Court directed mandamus to a state trial court that had defied the Supreme Court's earlier mandate. The Court rejected the argument, echoed here, that mandamus was barred by the availability of immediate appeals within the state-court system: "A litigant who . . . has obtained judgment in this Court after a lengthy process of litigation . . . should not be required to go through that entire process again to obtain execution of the judgment of this Court." *Id.* at 497.[12]

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[12] The cases on which the FCC relies (FCC Pet. 26) did not involve mandamus petitions seeking to enforce a prior mandate. In cases like this one, by contrast, the courts of appeals have not hesitated to grant mandamus despite the availability of an immediate direct appeal. *See, e.g., American Trucking*, 669 F.2d at 960 (granting forward-looking mandamus relief even though the agency's defiance was manifested in immediately appealable orders); *MCI Telecommunications Corp. v. FCC*, 580 F.2d 590, 594, 597 (D.C. Cir.) (granting mandamus because FCC's positions, even though expressed in an immediately appealable order, "are clearly inconsistent with the basic themes of our [prior] decision"), *cert. denied*, 439 U.S. 980 (1978); *Citibank, N.A. v. Fullam*, 580 F.2d 82, 90 (3d Cir. 1978) ("Regardless of the availability of appeal, we think that the writ of mandamus is the proper remedy to compel the district court to comply with our earlier order."); *Yablonski v. United Mine Workers Union*, 454 F.2d 1036, 1038 (D.C. Cir. 1971) (issuing mandamus even though "the order now challenged was appealable"), *cert. denied*, 406 U.S. 906 (1972).

B. The FCC's Renewed Assertion of Pricing Jurisdiction Violated the Eighth Circuit's Prior Mandate

Petitioners' merits argument rests on a manifestly mistaken premise. In their view, because section 271 authorizes the FCC to assess a Bell company's compliance with the competitive checklist, and because the checklist requires interconnection "in accordance with the requirements of sections 251(c)(2) and 252(d)(1)" (47 U.S.C. § 271(c)(2)(B)(i)),[13] section 271 necessarily authorizes the agency to formulate its own substantive pricing standards for interconnection independent of those applied by the State commissions to whom section 252(d) expressly assigns that responsibility. *See* FCC Pet. 15, 28. Petitioners' inference is unwarranted. Section 271 by its terms neither creates pricing standards nor empowers the FCC to define any such standards. Instead, it incorporates the substantive pricing determinations that the statute entrusts to State commissions: the pricing "requirements" to which section 271 refers are the "just and reasonable rate[s]" that are "[d]etermin[ed] by a *State commission*." 47 U.S.C. § 252(d)(1) (emphasis added).

With respect to pricing, therefore, it necessarily follows that the FCC, in passing on a section 271 application, can require no more than interconnection in accordance with the pricing principles promulgated *by the States* pursuant to sections 251 and 252. Contrary to the Solicitor General's supposition, this conclusion does not force the FCC to give "dispositive weight . . . to a state commission's legal evaluation of the Bell company's claims of compliance with Sections 251(c) and 252(d)(1)." FCC Pet. 17. The FCC still has ultimate responsibility for determining, when it reviews a section 271 application, whether a Bell company is in *compliance* with the relevant pricing requirements. The State commissions' responsibility, by contrast, is to *define* the pricing requirements with which

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[13] *See also* 47 U.S.C. § 271(c)(2)(B)(ii); § 271(c)(2)(B)(xiii); § 271(c)(2)(B)(xiv).

the Bell company must comply. Those discrete roles are wholly compatible.

At bottom, of course, petitioners dispute the Eighth Circuit's underlying holding that the States have exclusive jurisdiction to determine the pricing terms of local interconnection arrangements. But that issue is already before the Court in the *Local Competition Case*; for purposes of these petitions, one must assume that the Eighth Circuit was correct. *See* FCC Pet. 14. On that assumption, petitioners' reading of section 271 is nonsensical. Once a State exercises its pricing authority, the resulting determination is legally binding; it establishes the law that a Bell company must follow in setting prices. Under petitioners' theory, however, section 271 empowers the FCC to override a State's pricing determinations and independently dictate the intrastate pricing principles that a Bell company must follow to obtain long-distance entry.

That approach would penalize any State that dared to deviate from the FCC's pricing principles, for its consumers would then be deprived of increased long-distance competition. And a Bell company would be forced either to forsake its rights and obligations under State-approved pricing provisions or forgo its statutorily guaranteed opportunity to apply for long-distance authority. Moreover, because the Bell companies serve roughly 80% of all access lines in the United States,[14] and because the State commissions are unlikely to apply different pricing principles to different carriers subject to their jurisdiction, the coercive effect of the FCC's approach will be felt by all States and all incumbent local exchange carriers.

It is inconceivable that Congress would have intended such a perverse jurisdictional regime—in which the FCC would be free to substitute its own pricing standards for those of a State if, but only if, a Bell company files an ap-

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[14] *See* FCC, Statistics of Communications Common Carriers, Tables 2.3, 2.19 (Dec. 1997).

plication for long-distance authority, and in which the States dare not exercise the pricing authority so plainly assigned to them. Certainly, nothing in the statutory text requires that result. The Solicitor General said as much when he asked this Court to vacate the Eighth Circuit's stay: "Congress intended . . . both the States and the FCC [to] apply consistent principles for interconnection and unbundled access in their respective proceedings under Sections 252 and 271." Application to Vacate Stay, *FCC v. Iowa Utils. Bd.*, No. 96-299, at 31 (filed Oct. 24, 1996). Although the Solicitor General now takes a different view of the matter (FCC Pet. 20, 27-28), he nowhere explains how his reading of the FCC's authority under section 271 can possibly be reconciled with the Eighth Circuit's jurisdictional holding in the *Local Competition Case*.

Petitioners gain nothing from their backup argument that the FCC can override the States' rate determinations under cover of the statute's "public interest" standard. *See* FCC Pet. 16; Pet. App. 28a ("even if it were decided that we lacked authority to review BOC prices as an aspect of our assessment of checklist compliance under section 271 (d)(3)(A), we would certainly consider such prices to be a relevant concern in our public interest inquiry under section 271(d)(3)(C)"). Although it is true that one of the requirements for approval of a section 271 application is that "the requested authorization is consistent with the public interest," 47 U.S.C. § 271(d)(3)(C), that provision cannot sensibly be read to negate the balance of the statute's jurisdictional allocation.

On the contrary, Congress took care to prevent precisely the sort of unbounded interpretation that petitioners here advocate. It specified that "[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist." 47 U.S.C. § 271(d)(4). For the FCC to hold that subservience to its preferred pricing principles, though not required by sections 251 and 252 or by the checklist, *is* required for purposes of the public-

interest determination would improperly "extend the terms used in the competitive checklist."

Finally, there is no merit to AT&T's assertion that the Eighth Circuit's mandamus order "is in direct conflict with" the D.C. Circuit's decision in *SBC Communications Inc. v. FCC*, No. 97-1425, 1998 U.S. App. LEXIS 5276 (D.C. Cir. Mar. 20, 1998), affirming the FCC's denial of a section 271 application in Oklahoma. *See* AT&T's Supp. Br. 3. The D.C. Circuit neither had before it nor purported in any way to decide whether section 271 entitles the FCC to substitute its pricing policies for those of the relevant State commission under section 252(d). Rather, the D.C. Circuit said only that Congress charged "the FCC, and not the State commissions, with deciding the merits of the BOCs' requests for [long-distance] authorization," and "the statute does not require the FCC to give the State commissions' views any particular weight" in making those decisions. Slip op. 13, 1998 U.S. App. LEXIS 5276, at *21. Neither of those propositions conflicts in any way with the Eighth Circuit's ruling. That the FCC has authority to assess a Bell company's compliance with the checklist's requirements is neither disputed nor in conflict with the Eighth Circuit's holding that State commissions have authority to define the pricing requirements with which the Bell company must comply. The Solicitor General thus correctly acknowledged, before the D.C. Circuit issued its decision, that the *SBC Communications* case did not implicate "the basic issues presented" in the present petitions. FCC Pet. 24 n.8.

CONCLUSION

The petitions for a writ of certiorari should be held pending review of this Court's decision in the *Local Competition Case* and should be disposed of in light of that decision.

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